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In the
Supreme Court of the United States

OCTOBER TERM, 1970

No. 1295

WILLIAM R. BALLOU, et al.,
PETITIONERS,

v.

GENERAL ELECTRIC COMPANY,
RESPONDENT.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

LAURENCE S. FORDHAM
10 Post Office Square
Boston, Massachusetts 02109
Counsel for Respondent

Of Counsel:
DAVID W. WALKER
FOLEY, HOAG & ELIOT

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Questions Presented

1. Did the Court of Appeals correctly hold that petitioners' classroom time was not compensable under Sections 6 and 7 of the Fair Labor Standards Act, 29 U.S.C. § 206-207?

2. Did the Court of Appeals correctly hold that petitioners' classroom time was not "principal activity" or "integral and indispensable" to such activity, and hence not compensable under Section 4 of the Portal-to-Portal Act, 29 U.S.C. § 254(a)?

3. Did the Court of Appeals correctly find support for its decision that petitioners' classroom time is not compen-

sable since there was compliance with 29 C.F.R. § 785.22, under which there is no compensation for classroom time in connection with an apprenticeship program which "substantially meets the fundamental standards" of the Bureau of Apprenticeship and Training, United States Department of Labor?

4. Did the Court of Appeals correctly find support for its decision that petitioners' classroom time is not compensable in an opinion to that effect of the Wage-Hour Administrator?

Statement of the Case

This is an action by past and present apprentices at the Lynn, Massachusetts plant of the defendant General Electric Company ("GE") who claim that the Fair Labor Standards Act entitles them to be paid for time spent receiving classroom instruction and doing homework. The 106 plaintiffs also seek overtime pay and double liquidated damages.[1]

After the Court of Appeals had refused to dismiss on the pleadings (393 F.2d 398; Petition, pp. 41-45), GE moved for summary judgment and filed a sixty-page affidavit (item 9) with several hundred pages of exhibits, as well as two shorter affidavits (items 11, 12), one of which set forth an opinion letter of the Wage-Hour Administrator holding that the Fair Labor Standards Act does not require pay for the time in question (item 11).[2] The apprentices filed a 14 page counteraffidavit of the business agent of the

[1] While the complaint purports to be brought on behalf of all similarly situated apprentices, only 106 apprentices have joined the action in the manner required by 29 U.S.C. § 216(b). There are at present about 225 GE apprentices at Lynn, not including alumni. (Record Appendix, item 9, p. 1).

[2] Citations by "item" refer to items in the record appendix filed by counsel for the apprentices in the Court of Appeals.

relevant union (item 10) and also relied on answers submitted by GE in response to interrogatories (item 7). The counteraffidavit deals almost exclusively with a single subissue as to whether one of twelve requirements of the Bureau of Apprenticeship and Training, United States Department of Labor—that of so-called "employee-employer cooperation"—was met.

On this record, the District Court granted summary judgment in favor of GE (Petition, pp. 35-40), and the Court of Appeals affirmed (Petition, pp. 27-34) and denied rehearing (Petition, p. 26).[3]

The undisputed facts emerging from the affidavits may be summarized as follows. GE's Lynn plant provides apprentice programs in a number of trades. Apprentices are chosen with a battery of tests and interviews (item 9, pp. 6-8, 20). They go through an elaborate schedule, covering several years of on-the-job training in useful skills relating to the trade for which they are being trained, much of this training being given in a special room about the size of a football field and containing equipment worth about $1,225,000 (item 9, pp. 8-10, 13, 39-41). Their progress is supervised, recorded, and rewarded; and many of them rise after their graduation to executive positions with GE and other employers (item 9, pp. 13-15, 19-20). For their on-the-job training, they are presently paid at rates that start at $2.295 per hour and rise to between $2.895 and $3.56; rates were of course lower in the past, but at all times far higher than the minimum wage then or now prescribed by the Fair Labor Standards Act (item 9, pp. 11-13). In fact, the petitioners' wages are so much higher per hour than minimum wages that their average compensation per hour exceeds the minimum hourly wage even including the

[3] Citations herein to the opinions of the Court of Appeals are to the Petition.

classroom and home study hours which, by agreement, are not compensated (item 9, p. 11).

The apprentices, and many other Lynn employees, are represented by a union, which most apprentices have chosen not to join (item 9, p. 15). Three apprentices are union shop stewards, and apprentice problems are discussed at plant-wide meetings between union and management which occur four or five times each month (*id.*). An informal understanding protects apprentices from being laid off during their training (item 9, p. 16). Also, apprentices are entitled to fringe benefits (e.g., vacations, employee discounts, pension and insurance plans) to the same extent as nonapprentices and benefit from the various rights conferred by the applicable collective bargaining agreement (item 9, pp. 12, 15-16, and Exhibit 10).

In addition to on-the-job training, apprentices receive "related instruction" for periods which have totalled between 510 and 756 hours, by far the most common total being 614 hours spread over three years (item 9, pp. 8-10). Most of this instruction is given in classrooms in the GE Lynn plant, and the remainder at nearby schools (item 9, p. 7). Related instruction is not necessary to enable an apprentice to perform production work, and in fact a large proportion of apprentices work from one to six months before they receive any related instruction at all (item 9, pp. 39-41). On the average 20 apprentices per month perform productive work full-time before they receive any related instruction at all (item 9, p. 39). Most of GE's journeymen have acquired their skills without classroom instruction (item 9, pp. 39-41). The course materials give the apprentices a basic education in technical fields related to, but not necessarily required by, their production work: some courses cover the theoretical bases of the techniques used on the job, and some introduce the apprentices to advanced theories and techniques used in other skilled, high-

paying jobs in or outside GE which they may ultimately reach after leaving the apprentice programs (item 9, pp. 35-39).

With rare exceptions, the apprentices are engaged in on-the-job training 8 hours a day, 40 hours a week, in apprenticeship programs which last between three and four years. Hours of work experience range from 6,000 to 8,000 hours, and hours of related studies range from a minimum of about seven percent to a maximum of about ten percent of total hours (item 9, pp. 9, 21; item 17).

Although GE pays all tuition expense, GE Lynn apprentices are not and never have been paid for related instruction (item 9, pp. 12-13).[4] Apprentice agreements explicitly provide that there is no pay for such related instruction, and apprentices are so informed before they join the programs (*id.*). It has never been claimed that the applicable collective bargaining agreements entitled apprentices to be paid for related instruction (item 9, Exh. 10).

It is for the time spent in related instruction, and in preparing for it and doing homework, that the plaintiffs seek pay, overtime, and liquidated double damages.

Opinion Below

The Court of Appeals' holding that compensation is not required is based on two independent grounds and finds support in two others. (a) The Court held that time spent by apprentices in benefitting from their classroom training is not "hours worked" within the meaning of Sections 6 and 7 of the Fair Labor Standards Act. (Petition, pp. 30-31). (b) The Court also held that such time is not "principal activity" or "integral and indispensable" to "principal activity", and hence not compensable under

[4] The only exception is that certain apprentices released early to attend classes during their normal workday are nevertheless paid through the end of their shifts (*id.*).

section 4 of the Portal-to-Portal Act. (Petition, p. 31). (c) The Court observed that its conclusion was "bolstered" by GE's compliance with 29 C.F.R. 785.32 (Petition, pp. 31-32), which provides that such time is not compensable if the apprenticeship program "substantially meets the fundamental standards" of the Bureau of Apprenticeship and Training. (Petition, p. 51). (d) It also found "secondary and cumulative" support in an Opinion Letter of the Wage-Hour Administrator (Petition, pp. 58-60) that the Fair Labor Standards Act does not require pay for classroom time "primarily of benefit to the employee" such as the Administrator found to be involved in this case. (Petition, pp. 26, 33).

Argument

I. This Case Does Not Merit The Court's Attention.

This case does not merit consideration by this Court for the following reasons:

1. Lower court decisions do not conflict with respect to the issues attempted to be argued in the Petition; indeed, those issues are so insignificant that they have gone virtually unlitigated. Counsel is aware of only three reported cases (aside from the present one) dealing with the status of instructional programs under the Fair Labor Standards Act or Portal-to-Portal Act. All three were decided in 1947, two of them by this Court. *Walling* v. *Portland Terminal Co.*, 330 U.S. 148 (1947); *Walling* v. *Nashville, C. & St. L. Ry.*, 330 U.S. 158 (1947); *Chepard* v. *May*, 71 F.Supp. 389, 393 (S.D.N.Y.) (1947). This granny of the law needs no further illumination.

2. The decision below turns on particular facts and lacks wide impact. When this case was previously before it, the Court of Appeals refused to dismiss the complaint

(Petition, p. 41). The Court in effect declined to rule that the classroom and homework time of apprentices is *never* compensable under the Fair Standards Act. GE then submitted an affidavit (item 9) describing in detail the particular classroom courses here at issue, their relation to the work of the apprentices in this case, and other relevant facts. As the opinion of the Court below shows, the resulting summary judgment was based on the specific facts before the Court. (Petition, pp. 27-29, 32).

3. The applicable law is well developed in numerous decisions of this Court, and all that was required in the instant case was application of established legal principles to facts thoroughly developed in over 500 pages of affidavits and appended documents.

The governing principles as to what activity is compensable under the Fair Labor Standards Act are stated in *Tennessee C. I. & R. Co.* v. *Muscoda Local 123*, 321 U.S. 590, 598 (1944):

> "Congress here was referring to work or employment . . . as meaning physical or mental exertion (whether burdensome or not) controlled or required by the employer and *pursued necessarily and primarily for the benefit of the employer and his business.*" (Emphasis added.)

Accord, *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680, 691-92 (1946); *Jewell Ridge Coal Corp.* v. *Local No. 6167*, 325 U.S. 161, 163-66 (1945). *Walling* v. *Portland Terminal Co.*, 330 U.S. 148 (1947), and *Walling* v. *Nashville, C. & St. L. Ry.*, 330 U.S. 158 (1947), provide further guidance in application of these general principles to the status of instructional programs which benefit those who participate in them.

The issue before the Court of Appeals is whether, on the particular facts of this case, the related studies were "no-

cessarily and primarily" for GE's benefit. The Court below determined otherwise (Petition, pp. 30-31), as did the Wage-Hour Administrator, who determined that "the classroom instruction and attendant homework is primarily of benefit to the employee and of such a character that the time spent therein may be excluded from compensable hours . . . ." (Petition, p. 60). The facts pertinent to this issue are not disputed in any particular by the apprentices, and all that is involved is application of principles settled by this Court to undisputed facts.

The governing principles under the Portal-to-Portal Act, which is the Court of Appeals' second ground, are developed in *Steiner* v. *Mitchell*, 350 U.S. 247 (1956), and *Mitchell* v. *King Packing Co.*, 350 U.S. 260 (1956). This Court there held that an activity is compensable only if it is "an integral and indispensable part of the principal activity of the employment" (350 U.S. at 356), and that changing clothes in a chemical plant and sharpening knives in a meat packing plant outside of normal working hours were an "integral and indispensable" part of the employees' "principal activity" of productive work. On this issue, too, all that was required of the Court of Appeals was application of these principles to facts set forth in the Richter affidavit and attached exhibits (item 9), and not contested by the affidavit of any apprentice or by the 14 page affidavit of a union official (item 10). Mr. Richter's affidavit set forth in considerable detail pertinent facts which conclusively demonstrate that the principal activity of apprentices is their on-the-job training, which occupies them eight hours a day, five days a week, and over 90% of their time, and teaches them the requisite skills to do their jobs. Mr. Richter's affidavit contains a very thorough explication of the apprentice programs involved, including schedules of shop assignments, examples of typical production jobs performed by the apprentices, sum-

maries of the skills and techniques required to perform those jobs, schedules of class hours and typical homework requirements, summaries of the subject matter covered by each of the courses offered, and description of the relationship between the production work performed by the apprentices and their related studies (item 9, pp. 39-59); it contains a general explanation of the role of related studies in the GE apprenticeship programs at Lynn, and a detailed description of each program, including the skills necessary for on-the-job training of the apprentices in the several programs and the subject matter of the academic courses related to each of the programs (item 9, pp. 41-59). To cover adequately here the pertinent detail contained in the Richter affidavit would require quotation of nearly all the material set forth at pages 41-59 of the Richter affidavit and in many of the supporting exhibits, none of which is in any way controverted by the apprentices. In the case of each of the programs, the affidavit summarizes the kinds of jobs an apprentice would be required to do, the skills necessary to perform those jobs, and the time occupied by production work and related studies. The affidavit then reviews the subject matter of each of the courses in the program of related studies, showing that in each program some of the courses involve systematic reviews of the theoretical bases for the practical techniques learned on the job, and the other courses involve advanced material, intended to broaden the apprentices' technical education, which is not used on the job at all. In this way, the affidavit covers every course in every program involved here, and demonstrates as to each that the principal activity is production work, and the related studies are not "integral and indispensable" thereto.

The Petition thus does not dispute the governing principles, but only their application to the particular complex of facts in this case.

4. The decision below is supported by multiple grounds, none of which is of general importance, each of which turns on particular facts, and any one of which is adequate to support the decision.

The Court of Appeals' main ground is that, irrespective of the Portal-to-Portal Act, the apprentices in this case were not entitled to be paid for classroom instruction, in view of *Walling* v. *Portland Terminal Co.*, 330 U.S. 148 (1947). (Petition, pp. 30-31). To this main ground, the Petition devotes less than a page (pp. 10-11).

Second, the Court of Appeals held that, under the Portal-to-Portal Act, classroom time is neither a "principal activity" of these apprentices nor "integral and indispensable" to such an activity. (Petition, p. 31). The Petition devotes seven pages to this second ground, entirely in an effort to develop that, *on the facts of this case*, the activity in question is "principal" and "integral and indispensable" (pp. 9-15).

Next, the Court of Appeals stated that its decision was "bolstered" by GE's compliance with 29 C.F.R. § 785.32 (Petition, pp. 31-32). To this subsidiary ground, which is not essential to the Court's conclusion, the petition devotes more than nine pages (pp. 15-24), most of which are directed at a footnote, which is itself merely supplementary. Section 785.32 provides in substance that such time as is in question is not compensable if it "does not involve productive work or performance of the apprentices regular duties", which it does not in this case, and if the apprenticeship program "substantially meets the fundamental standards of the Bureau of Apprenticeship and Training." (Petition, p. 51). As more fully appears in Part III hereof, the "fundamental standards" contain twelve requirements; compliance with eleven of these is not even questioned. The Court of Appeals held that there was "substantial compliance" with the Bureau's "fundamental

standards" even assuming arguendo that the twelfth requirement of "employee-employer cooperation" was not met, and also that there was compliance with the twelfth standard of "employee-employer cooperation." (Petition, p. 32). The decision on this latter point, which occupies about one-half of the Petition's argument, turns upon detailed analysis of factual minutiae which certainly does not merit the attention of this Court.

Finally, the Court of Appeals observed that its decision was supported by an opinion of the Wage-Hour Administrator that the very time in issue was not compensable in the circumstances under 29 C.F.R. § 785.31. (Petition, p. 33).

The Administrator has found that the very classroom courses involved in this case need not be compensated. (Petition, pp. 58-60). His conclusion is, of course, entitled to great weight. *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944); *Roland Electric Co.* v. *Walling*, 326 U.S. 657, 676 (1946). The apprentices' criticism of the Administrator's opinion letter does not discuss any divergence by the Administrator from the statute or court interpretations, but claims that the Administrator misconstrued provisions *which he himself promulgated* (Petition, pp. 22-24). Courts are understandably reluctant to uphold claims that an agency does not understand its own words. E.g., *Immigration and Naturalization Service* v. *Stanisic*, 395 U.S. 62, 72 (1969); *Thorpe* v. *Housing Authority of Durham*, 393 U.S. 268, 276 (1969); *Udall* v. *Tallman*, 380 U.S. 1, 4 (1965); *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 413-14 (1945).

Although the Court described its reliance upon the Administrator's decision under 29 C.F.R. § 785.31 as "secondary and cumulative" in denying a petition for rehearing (Petition, p. 26), and its reliance on 29 C.F.R. § 785.32 as having "bolstered" its decision, each can stand as an inde-

pendent ground of decision which is based on detailed factual analysis and is clearly correct. (See pp. 13-24).

5. Neither does this case involve any summary judgment problem. GE submitted to the District Court hundreds of pages of affidavits and exhibits (item 9, 11, 12). Since the action had been pending since 1967 and concerned classroom courses in which the plaintiff apprentices had themselves participated, they had ample opportunity to put their side of the case before the District Court. They submitted a 14 page affidavit (item 10), with exhibits not included in their Record Appendix. In upholding summary judgment on such a record, the Court of Appeals did not deviate from this Court's decisions. Indeed, the First Circuit has stringently confined summary judgment.[3] No jury trial is involved, since no jury was claimed. This Court should not be obliged to search through voluminous records merely on the claim that the lower courts, applying the correct summary judgment standard, somehow overlooked a lurking issue of fact that the plaintiffs cannot articulate.

6. Finally, the result below works no conceivable injustice. The plaintiff apprentices have had ample opportunity to present their case. The case has been heard twice by the District Court, and twice by the Court of Appeals. The apprentices received wages much in excess of what the Fair Labor Standards Act requires for their nonclassroom time, benefitted from a costly training program, and were informed in advance that they would not be paid for classes. The Wage-Hour Administrator and both lower courts have

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[3] E.g., *George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.*, 424 F.2d 25, 28 (1970), *cert. denied*, 39 U.S. Law Week 3140 (1970); *Morrissey v. Procter & Gamble Co.*, 379 F.2d 675, 677 (1967); *Rogen v. Ilikon Corp.*, 361 F.2d 260, 265-66 (1966); *see also Colourpicture Publishers, Inc. v. Mike Roberts Color Prods., Inc.*, 394 F.2d 431, 435, *cert. denied*, 393 U.S. 848 (1968); *Rans v. Spencer*, 393 F.2d 108 (1968); *World Airways, Inc. v. Northeast Airlines, Inc.*, 358 F.2d 691 (1966).

found that compensation is not required, and there is no cause for this Court to reexamine the limited grounds on which those several decisions are based.

II. The Decision Of The Court Of Appeals Is Clearly Correct.

A. *The Apprentices' Classroom Time Would Not Have Been Compensable Even Before Enactment Of The Portal-To-Portal Act.*

As previously noted (pp. 7-8, *supra*), the "work" that is compensable under the Fair Labor Standards Act includes "*Exertion pursued necessarily and primarily for the benefit of the employer and his business.*" *Jewell Ridge Coal Corp. v. Local No. 6167*, 325 U.S. 161, 163-66 (1945) (emphasis in original).

Petitioners' argument to this Court completely ignores the requirement that the activity be "necessarily and primarily" for the employer's benefit (Petition, p. 10). Apprentices are trained in a skilled trade satisfying the requirements of 29 C.F.R. § 521.4 (item 9, p. 24), which requires that the trade:

> "(f) Involves the development of skill sufficiently broad to be applicable in like occupations throughout an industry, rather than of restricted application to the products of any one company."

Teaching apprentices such a trade, one which qualifies them to perform a variety of tasks for a variety of employers,

obviously confers on them a very considerable benefit, particularly when they receive substantial pay while being taught.

The classroom portion of the apprentice program also predominantly benefits the apprentices. It is provided at GE's expense, and to a substantial extent at established educational institutions (item 9, p. 10). The bulk of the course material covered is of a theoretical, background nature that contributes to the education and future careers of the apprentices but is in no way needed for their on-the-job training work; even those courses which touch on skills also involved in on-the-job work are dispensable, and requisite skills are also taught on the job; apprentices often go many months doing acceptable on-the-job work before they even begin classroom studies; and most GE journeymen have never had any classroom instruction relating to their trades at all (item 9, pp. 39-59). As the Court of Appeals noted:

> "For the most part, the classwork does not relate directly to the skills apprentices receive in on-the-job training. Its approach is more theoretical, providing the apprentices with an academic understanding of the skills they are developing." (Petition, pp. 27-28).

In short, the undisputed facts simply do not fit the picture of activity which is "pursued necessarily and primarily for the benefit of the employer and his business".

That there would have been no recovery in this case even under the Fair Labor Standards Act is further indicated by *Walling* v. *Portland Terminal Co.*, 330 U.S. 148 (1947), in which this Court held that participants in "a course of practical training to prospective yard brake-

men" given by the respondent railroad were not "employed" and therefore not covered by the Fair Labor Standards Act. This Court relied on the Act's policy of encouraging apprenticeship (29 U.S.C. § 214), a policy plainly applicable here. The result sought by the apprentices would have quite the opposite effect. Employers faced with the unexpected burden of paying for classroom and study time would certainly curtail, if not terminate, apprenticeship programs, and the purpose of Congress would be thwarted.

As the Court of Appeals observed, *Portland Terminal* made clear that to the extent trainees are receiving instruction, as distinct from working, they are not entitled to compensation. Their legal position is not improved by the fact that GE also employs the apprentices for production work, and pays them for that work at rates well above the minimum wage.

This aspect of the decision below is further supported by the opinion of the Wage-Hour Administrator that "the classroom instruction and attendant homework" in the Lynn-GE apprenticeship programs "is primarily of benefit to the employee . . . ." (Petition, p. 60), which opinion is entitled to great weight pursuant to numerous decisions of this Court (p. 11, supra).

B. *The Classroom Time Is Not Compensable under The Portal-to-Portal Act.*

The principal purpose of the Portal-to-Portal Act, 29 U.S.C. § 254(a), was, of course, to limit, rather than to enlarge, the coverage of "hours worked" under the Fair Labor Standards Act. *See* H.R. Rep. No. 71, 1947 U.S. Code Cong. Serv. 1020 (Feb. 25, 1947).

The essence of the Act insofar as it is applicable here is that there not be compensation for "activities which are preliminary or postliminary" to "the principal activity

or activities which such employee is employed to perform", "which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities." (29 U.S.C. § 254(a); Petition, p. 49).

The undisputed facts on the record before the Court of Appeals establish beyond question that the related studies of the Apprentices were not an "integral and indispensable part" of their "principal activities," and thus are not compensable under the doctrine of *Steiner* v. *Mitchell*, 350 U.S. 247 (1956) and *Mitchell* v. *King Packing Co.*, 350 U.S. 260 (1956). The Richter affidavit (item 9) covers every course in every program involved here, and demonstrates as to each that the apprentices can and regularly do perform their shop work assignments without having had any related instruction; that most journeymen in the trades practiced by the apprentices (who, *ex hypothesi*, can and do perform the most difficult of the tasks assigned to the apprentices) have not had any academic instruction equivalent to the related studies courses involved here; that the related studies could be dispensed with entirely; that requisite instruction is given on-the-job; and that the training function of the apprenticeship program could be accomplished satisfactorily by a program involving solely on-the-job training of the kind afforded apprentices now (item 9, pp. 39-40). The affidavit abundantly shows that the on-the-job training, which occupies eight hours a day, forty days a week, and over 90% of the apprentices' time, is their principal activity, and that their classroom instruction is dispensable.

Petitioner's contrary argument, based solely on what GE required of them, overlooks the obvious distinction between what is required of an apprentice if he wants to keep his job and what is absolutely necessary in order to

enable him to perform his work. The latter is clearly the critical question under the teaching of *Steiner* and *King Packing Co.* In *Steiner*, the Court held that employees of a storage battery manufacturer were entitled to compensation for time spent in showering and changing clothes, not because their employer required it, but because the peculiar health hazards of their work made it impossible to perform that work without showering and changing. Similarly, in *King Packing Co.*, the Court held that sharpening their knives was an "integral and indispensable part" of the primary work of knifemen in a meat packing plant because without sharpening their knives they could not perform that work. The critical distinction is that in *Steiner* and *King Packing* the employees could not perform their production work without engaging in the disputed activities, whereas here, it is undisputed that the apprentices can perform their productive work entirely without related studies. It follows under the principles of *Steiner* and *King Packing* that the apprentices' related studies are not integral and indispensable to their productive work, and hence, the time devoted thereto is noncompensable under Section 4 of the Portal-to-Portal Act.

Moreover, the factual analysis of the Richter affidavit is abundantly supported by the regulations of the Wage-House Administrator, which confirm that classroom instruction is "supplemental" to the principal activity of "work experience." Section 521.4 explicitly refers to "related instruction to supplement the work experience" (29 C.F.R. § 521.4); Section 785.32 refers to it as "related supplemental instruction" and "related supplemental training" (29 C.F.R. § 785.32), and section 521.3(i) indicates that "related instruction" must be provided "if available", and may be provided in the classroom, as here, or "through correspondence courses; or other forms of self study" (29 C.F.R. § 521.3(i)).

Other examples of activities integral and indispensable to productive work cited in a Senate colloquy which appears as an appendix to the Supreme Court's opinion in the *Steiner* case (350 U.S. at 256-259) confirm that the apprentices' related studies are not principal activity that Congress intended to be compensable. Senator Cooper there refers to preparatory activities which:

> "were so closely related to his *productive activity* that the employer must compensate the employee for it." (Emphasis added.) (350 U.S. at 256);

he approves of the principle that:

> "any activity of a worker shall be considered a part of his principal activity if the doing of that act is indispensable to the performance of *the rest of his day's work.*" (Emphasis added.) (350 U.S. at 257);

and he indicates that changing clothes is compensable only where "the employee could not perform his activity without putting on certain clothes." (350 U.S. at 258). The kinds of activities indicated by Senator Cooper to be "integral and indispensable" to productive work, such as oiling machinery, preparing tools and moving cloth, are so different from the activities in question in this case as to confirm, under the canon of *ejusdem generis*, that the apprentices' related studies are not "indispensable" to their productive work in the sense of that term as used in the legislative history.

Furthermore, as the Report of the Senate Judiciary Committee states, the Portal-to-Portal Act

> ". . . provides that activities performed outside of the workday, are not to be compensable except by contract or by a practice or custom not inconsistent therewith.

> The rule laid down is that activities which take place either prior to the time at the beginning of his workday, when such employee commences, or subsequent to the time at the end of his workday, when such employee terminates his principal activity or activities, are activities (called portal-to-portal activities) which are not compensable except by contract or by a practice or custom not inconsistent therewith." (S. Rept. No. 48, 80th Cong., 1st Sess. 47).

The basic thrust of the legislative history is that the compensability of nonproductive activities performed outside of normal working hours which are not indispensable to productive activities is dependent upon a "contract" or "custom or practice", none of which is present here.

C. The Requirements Of Section 785.32 Were Met.

The next supposed error of the Court of Appeals resides in its conclusion that there was "employee-employer cooperation" (Petition, pp. 15-24).

As previously noted, § 785.32 "bolstered", but was not essential to, the decision below; and in any event, all that § 785.32 requires is employment under an apprenticeship program "which substantially meets the fundamental standards" for apprenticeship of the Bureau of Apprenticeship and Training, which would be the case even if the Court of Appeals erred in its conclusion that the requirement of "employee-employer cooperation" was met. That requirement is one of 12 requirements of the Bureau of Apprenticeship and Training for apprenticeship programs referred to in 29 C.F.R. § 785.32 (item 9, pp. 3-20; item 12). That the other 11 were met is undisputed, and there was extensive cooperation (item 9, pp. 15-19). As the Court of Appeals stated (Petition, p. 32):

> "Appellants make no attempt to argue that G.E. does not comply with 11 of the 12 standards set forth in publications of the Bureau of Apprenticeship and Training. They claim there is an issue of fact as to whether there is compliance with the requirement of employee-employer cooperation on the basis of an affidavit which indicates that the union would like to have more influence over some aspects of the apprenticeship program. To the extent that, if proved, a latent union-management dispute over a part of the program would cast doubt on the existence of complete employee-employer cooperation, we find that doubt is not sufficient to show that a *substantial* compliance has not been obtained." (Emphasis in original.)

In any event, the decision of the court below that the twelfth requirement of "employee-employer cooperation" was met is abundantly supported by the record (item 9, pp. 15-19).

The Petition (pp. 15-24) misconstrues the Bureau of Apprenticeship and Training's standard of "employee-employer cooperation," which according to the Petition (p. 16) "requires the collective bargaining agent's participation *and approval* in the formation and the administration of the Apprenticeship program." (Emphasis supplied.)

The Court of Appeals' opinion abundantly demonstrates that petitioners' contention "is bootstrapped from their confusion . . . over two sets of standards", and also that "the fundamental standard speaks of cooperation, not agreement, and with employees, not bargaining units" (Petition, pp. 33-34, notes 5 and 6). The Bureau has repeatedly held apprentice programs in compliance with its standards without any indication of union approval or participation (item 9, pp. 17-18). Indeed, the Bureau has

informally and repeatedly approved the very apprentice programs in question here, after full disclosure (item 9, pp. 34-37). The Bureau pamphlets (items 24(a), (b)) from which the Petition (pp. 18-19) quotes, do not controvert this. They simply describe varieties of union participation which the Bureau thinks desirable when accepted voluntarily, without the slightest indication that such participation is required by the Bureau's fundamental standards.

The incredible consequences of the Petition's approach are vividly shown by the facts in this case. GE has instituted an elaborate discussion and bargaining program with its apprentices; they benefit, with other GE employees, from an extensive collective bargaining agreement, and are also protected by an informal "tenure" arrangement (item 9, pp. 15-16). In challenging this extensive showing of employee-employer cooperation, it is shown that the union has made various protests concerning the apprentices (item 10, pp. 9-12). The recurring subject of these protests was that apprentices were given work normally performed by "regular employees" and that apprentices were retained when regular employees received layoff notices (item 10, pp. 10-11). In other words, the union Business Agent's own affidavit (item 10) shows that the union has consistently favored the interests of its other members over those of the apprentices.[6] Under the circumstances, the Petition's claim (pp. 16-20) that there can be no "employee-employer cooperation" unless the union participates in and approves the formation and administration of apprenticeship programs would set the goat to guard the cabbage patch.

Moreover, even if a standard of "employee-employer

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[6] The incidents relied on also concern almost entirely the period between 1962 and 1964. Since this action was started in 1967 (item 1) and a two-year statute of limitations applies, 29 U.S.C. § 255(a), the incidents do not bear on the existence of employee-employer cooperation during any relevant period.

cooperation" could be read to imply a requirement of union "participation and approval", the union in this case has waived any such requirement. The applicable collective bargaining agreement provides that, "Subject only to any limitations stated in this Agreement . . . the Company retains the exclusive right to manage its business, including (but not limited to) the right to determine the methods and means by which its operations are to be carried on, to direct the work force, and to conduct its operations in a safe and efficient manner." (Item 9, pp. 16-17). There are no such limitations applicable to apprenticeship except the general provisions as to wages, hours and other terms and conditions of employment. Traditionally, GE has not shared the management of its apprentice programs with unions, and the above language was retained in the collective bargaining agreement after the union made a demand during negotiations, which GE rejected, that joint administration be instituted (item 9, p. 17). It is not claimed (to anticipate an argument made in the lower courts) that the clause quoted above waived the union's right to discuss and bargain about apprenticeship at individual GE plants; such bargaining has in fact occurred (item 9, p. 15). But the clause does waive any claim by the union to participate, as of right and with a veto, in the institution and administration of apprenticeship programs. It therefore bars the Petition's claim (pp. 16-20).

D. *Petitioners' Remaining Arguments Are Specious.*

Finally, the hodge-podge of arguments concluding the Petition (pp. 20-24) is as lacking in merit as what precedes it.

The Petition (p. 20) first argues erroneously that a material issue of fact remains in the case. No fact on which there is *any* conflicting evidence is specified, and none

exists. What is apparently meant is that the facts as shown do not constitute "employee-employer cooperation". But this is an issue of law such as appellate courts frequently decide. E.g., *Wyman* v. *James*, 39 U.S. Law Week 4085 (1971) (reasonableness of search decided on affidavits); *Graham* v. *John Deere Co.*, 383 U.S. 1, 17-37 (1966) (obviousness of invention); *Steiner* v. *Mitchell*, 350 U.S. 247, 256 (1956) (whether activity was integral and indispensable to principal activities under Portal-to-Portal Act).

The Petition then (pp. 20-22) urges, with equal incorrectness that it was impossible for GE's apprentice programs to meet 29 C.F.R. § 785.32 because they have not been registered and approved by the Bureau of Apprenticeship and Training or a state apprenticeship agency. No such requirement appears in § 785.32 itself. The Petition relies on language in an opinion letter which is dictum, and which in any case deals with what evidence of compliance with § 785.32 will be acceptable to the Wage-Hour Administrator. This was not meant to and cannot bind the courts, which have their own fact-finding apparatus available to test compliance. More basically, GE's programs *have* been approved by the agencies in question; several times by the Bureau of Apprenticeship and Training (informally), and once (after this action started) by the Division of Apprentice Training, Massachusetts Department of Labor and Industries (item 9, pp. 32-38).

Lastly, the Petition (pp. 23-24) attacks the validity of the Wage-Hour Administrator's Opinion Letter 996, which passed on precisely the apprentice programs involved in this case and held that GE has not violated the Fair Labor Standards Act. The Petition's claim that this opinion letter is inconsistent with a 1964 opinion letter was refuted by the Court of Appeals (Petition, p. 26) when it denied rehearing on this very issue.

"Apart from the fact that our reliance on this Letter was secondary and cumulative, we are persuaded that our reliance was correct. Opinion Letter 996, ruling that the G.E. program was a 'special situation', relates to 29 C.F.R. § 785.31, which has to do with 'special situations' when training programs are not considered as working time even though all of the criteria of section 29 C.F.R. § 785.27 are not met. The allegedly earlier conflicting Opinion Letter, 272, is addressed to the latter regulation."

The *relevant* rulings strongly support the Administrator's conclusion in this case. Opinion Letter of August 4, 1965, 6A BNA Lab. Rel. Rptr., WHM 93:808; Opinion Letter No. 431, 1961-1966 CCH Lab. Law Rptr., Wages-Hours Admin. Rulings 40,592 (1966); see Opinion Letter No. 465, Id. 40,632 (1966). It would therefore have been proper, not merely to bestow "secondary and cumulative" reliance on the Administrator's letter, as the Court of Appeals did, but to give it great weight. See cases cited *supra*, p. 11.

Conclusion

For these reasons, certiorari should be denied.

Respectfully submitted,

Lawrence S. Foreman
10 Post Office Square
Boston, Massachusetts 02109
Counsel for Respondent

Of Counsel:
David W. Walker
Foley, Hoag & Eliot